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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 54

CARBICE CORPORATION OF AMERICA
Petitioner

v.

AMERICAN PATENTS DEVELOPMENT CORPORATION and DRY ICE CORPORATION OF AMERICA
Respondents

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER.

Respondents' brief makes it perfectly apparent (*e. g.*, pp. 3, 6, 8, and elsewhere) that there is no dispute that the alleged invention of the Slate patent resides exclusively, as held by the Court of Appeals below, in *the locational arrangement, in a package, of the specific refrigerant, solid carbon dioxide, relative to the food stuffs to be refrigerated thereby.* In other words, and to be precisely specific, the alleged invention of the Slate patent is admitted to be the location of solid carbon dioxide in the center of—to be surrounded by—packages containing food stuffs, all enclosed in an outer box or other type of container.

Notwithstanding the simple and questionable nature of the alleged invention of the patent, Respondents have

devoted pages to repetitious eulogy of Slate's alleged contribution to the sum of human knowledge. In order to impress the Court, they have felt impelled to assume the absurd and untenable position that the present industry of refrigeration by solid carbon dioxide—indeed, commercial use of solid carbon dioxide at all—owes its very conception and its continued existence to the "invention" of the Slate patent. This contention, necessary though it may be to warrant serious consideration of the subject-matter of the patent as a patentable invention (and such contention is usually made *only* when that question is of grave doubt), is not only unsupported by the record but is entirely contrary to the facts, as Respondents well know. However, Respondents do make the contention here, and may reasonably be expected to make the contention hereafter if the judgment of the Court of Appeals is allowed to stand. Thus, Respondents are seeking to obtain a monopoly for an unpatented commodity—a perishable element of nature in solid form—by means of a patent which has nothing whatever to do with the creation or inherent properties thereof. As Judge CAMPBELL in the District Court so aptly stated (Rec. p. 431):

> "To me this suit appears to be an attempt on the part of plaintiff to do by indirection what it could not do directly, viz., *obtain a monopoly in the manufacture and sale of solid carbon dioxide as a refrigerant, which the patentee did not discover, nor has he a patent for it specifically.*"

Nor is this conclusion evaded by Respondents' assertion (brief, p. 32) that:

> "The Petitioner, as well as others, is perfectly free, so far as concerns the patent in suit, to make and sell solid carbon dioxide to be used in combinations *other* than that of the patent in suit."

According to Respondents' major contention, advanced for the purpose of convincing the Court that the patent discloses an invention at all, there is virtually no other use to which solid carbon dioxide can be put. The danger to legitimate industry that is thus presented by this case lies not in the truth of Respondents' assertion, but rather in the fact that Respondents make such assertion and, if the judgment of the Court of Appeals is affirmed by this Court, may reasonably be expected to hereafter make the assertion most effectively.

With this introduction, we will briefly consider the specific contentions in Respondents' brief, and devote the remainder hereof to such reply as may be warranted, endeavoring, however, to refrain from repeating what has already been presented in our main brief.

As to the Asserted "Merits" and "Great Value" of the Slate "Invention."

1. Respondents first raise the cry of "commercial success." They say in their brief (p. 5) that in 1925 there was sold (by the Dry Ice Corporation) 366,000 pounds of solid carbon dioxide, and that up to 1927 there had been sold nearly 5,000,000 pounds. We have no reason to question these figures (reproduced on p. 19, Rec.), which were produced by Mr. Martin, Engineer in charge of sales for the Dry Ice Corporation. The brief continues, however, with the statement

> *"of this amount about 90% has been used as set forth in the patent in suit (pp. 19, 157)."*

This statement is not supported by the record, as, indeed, it could not be, because it is contrary to the facts. *Nowhere does the witness Martin, who produced the figures,*

state that any substantial portion, or *any* portion, of the solid carbon dioxide sold by the Dry Ice Corporation was used in *the locational arrangement* constituting the invention of the patent in suit.

On turning to page 157 of the record, to which we are referred in the above quoted portion of Respondents' brief, we find that the evidence, on which the assertion is based, is in question and answer form, as follows:

> "Q. What percentage of the sales of the solid carbon dioxide sold by the plaintiff are used *in transportation packages in the ice cream trade?*
> "A. Approximately, I should say, 90%."

From this it will be noted that all that the witness said was that about 90% of the solid carbon dioxide sold by the Dry Ice Corporation *had been used in transportation packages in the ice cream trade.* There is a vast difference between the statement that the refrigerant had been used *in transportation packages in the ice cream trade,* and the assertion made in Respondents' brief that 90% of the refrigerant had been used *"as set forth in the patent in suit."* Indeed, the only testimony offered by Mr. Martin pertaining to how the refrigerant was used in the ice cream trade *is a use which, quite obviously, is not within the alleged invention of the Slate patent.* On page 23 of the record Martin describes the use of solid carbon dioxide by perhaps the largest dealer in ice cream in the United States, namely, the Schrafft Company (the Shattuck Company). That company used solid carbon dioxide for transportation of ice cream in the manner that was and is customary and usual to use it, as Respondents well know. That use, as described by Martin, was in containers, approved by the Dry Ice Corporation which

"consist of a cylindrical package of a kind known as the Sealright, in the particular use put to it. In this outer container was placed an insulating wall of corrugated board, the corrugations not closed, so as to permit the flow of gas to act as an insulator. Inside of this insulated container the pint or quart—usually it is a pint—of ice cream is placed *and dry ice is placed on top of that*, sometimes, but not always contained in a little paper sack.

"That container was a round cylinder of cardboard, on the inside of which was a layer of corrugated paper. *Inside of that was a cylindrical carton containing the ice cream with a piece of carbon dioxide on top.* There was also a vented cover to let the gas out. *That was the carton we approved of, showed them how to use.*"

In other words, the ice cream in its package is placed in a container with merely a piece of solid carbon dioxid *on top* of it and yet, as stated by Martin, the gas evolved from the solid carbon dioxide formed an insulator.

Thus we see that the *record*, as opposed to counsel's *argument*, discloses that the usual and customary way of employing solid carbon dioxide as a refrigerant was *not* to place the solid refrigerant in the *midst* of the material to be refrigerated, but rather, *on top* thereof. Respondents' cry of "commercial success" based on the invention of the patent in suit is, therefore, wholly without foundation in the record or in fact.

2. Respondents do not explain *why* their alleged commercial success is built upon the patent in suit, as distinguished from *other* patents and applications which they assertedly own (Rec. pp. 26, 27). It is particularly significant that nowhere in their advertising literature is the patent in suit referred to by number or

subject-matter, or in any way exploited. Furthermore, the original bill of complaint (Rec. p. 2) was based on *two* Slate patents, viz.: No. 1,511,306, as well as the patent in suit. At the commencement of the trial (Rec. p. 15) the first Slate patent was withdrawn from suit (obviously because the alleged invention was completely anticipated by the pleaded published art). How, then, can it be truthfully asserted that whatever commercial success Respondents have had was based upon the alleged invention of the patent in suit, as distinguished from that of the earlier Slate patent initially included in the suit; or those of the other patents and applications assertedly owned by them.

Furthermore, the invoice for every sale made by the Dry Ice Corporation (Plaintiff's Exhibit 7, Rec. p. 283) had printed thereon the matter reproduced on page 9 of our main brief. No mention of the patent in suit is contained therein, *but patent No. 1,511,306 is held forth as the important patent controlling the operations of the Dry Ice Corporation.*

Obviously, therefore, counsel's assertions as to the position in the art held by the Slate patent in suit is not only without foundation in the record or in fact, but does not even reflect Respondents' own viewpoint.

3. Finally, the nature of the alleged invention of the patent shows how utterly absurd is the contention that whatever commercial success Respondents have had is attributable to the Slate "invention," or that the industry owes anything whatever to it.

In the first place, all that is claimed for the invention by Respondents is an increased *efficiency* of refrigeration. But what, we ask, is this due to? Obviously it is due to only two factors:

(1) The low temperature of solid carbon dioxide (*an inherent physical property* of an element of nature) and

(2) The fact that solid carbon dioxide sublimes and gives off a gas which is extremely cold, and hence has refrigerative and insulative effect (likewise *an inherent property*).

Respondents admit, as indeed they must, that Slate did not invent solid or frozen carbon dioxide, or that such frozen product would evolve the cold carbon dioxide gas. By what legerdemain, it may be asked, does solid carbon dioxide do for Slate what it does not do and has not done for every one else, for many, many years? Respondents assert in their brief, not once, but many times, that the Slate "invention" increased the efficiency of solid carbon dioxide as a refrigerant, over that of water ice, from 15 to 25 times, whereas, prior to the Slate "invention," such ratio was believed to be 2 to 1. But what bearing has that fact, even if true, on the issues of this case? *Any* increased efficiency of solid carbon dioxide as a refrigerant, as compared to water ice, is due to nothing more than the inherent physical properties of solid carbon dioxide. But Slate, confessedly, did not discover solid carbon dioxide or its physical properties which make it more efficient as a refrigerant.

As Judge CAMPBELL stated (Rec. p. 433):

> "In fact all that we know today about solid carbon dioxide pertinent to this suit, except perhaps its higher ratio of refrigeration as compared to water ice, was known many years prior to any date with which we are here concerned, *and even if it has been found that such ratio is higher than 2 to 1, it is because of the inherent properties of the solid carbon dioxide, and not something which results from any improvement in manufacture by the plaintiff, or the teachings of the patent in suit.*"

The efficiency of carbon dioxide as a refrigerant is not due to any *particular locational arrangement* of the refrigerant relative to the material to be refrigerated. It is due, as recognized by Judge CAMPBELL, solely to the inherent properties of solid carbon dioxide. These are in no way dependent upon the *location* of the refrigerant, as witness the packages employed by Schrafft (Rec. p. 23). Likewise, the fact that the cold gas, evolved by sublimation of the solid, travels in all directions, is not attributable to the *location* of the refrigerant in the *center* of the materials to be refrigerated, as again witness the Schrafft packages. The solid carbon dioxide performs its refrigerating function, both as a solid and as a gas, *irrespective* of its location relative to the material to be refrigerated.

Furthermore, the repetitious assertion that the Slate "invention" made it possible to increase the efficiency of solid carbon dioxide as a refrigerant is purely and simply argument which *counsel* "invented" at the trial of the case, and utilize here in the futile effort to give the dignity of patentable invention to the mere locational arrangement of a specific refrigerant relative to food stuffs to be refrigerated. *Nowhere in the specification or claims of the patent is any such statement made.* All that the specification says on the subject is contained on page 188 of the record in the following language:

> *"As the carbon dioxide ice is nearly twice as dense as water ice and affords nearly twice as much refrigerative value per pound,* it is particularly desirable for shipping purposes where express or freight charges are important."

The truth of the matter is that the efficiency of solid carbon dioxide as a refrigerant, in comparison with water

ice, is no greater now than it ever has been. It is no greater in the locational arrangement alleged to be the invention of Slate than it is in any other arrangement. The ratio of from 15 to 25 times to 1 is based on British thermal units (B.T.U.s) and follows a mathematical equation—a law of science—a law which was just as true in 1845 as it is today.

SUMMARY.

Thus, it is seen that in reality there is no "merit" or "value" in the alleged invention of the patent. The industry owes it nothing, even were it an invention or were it patentable. The industry has been built upon the inherent, physical properties of an element of nature in solid form, and those properties exist and are utilized for refrigerating purposes *irrespective* of whether the refrigerant is placed on top, at the bottom, in the center, or at the side of the material to be refrigerated.

As to the Question of Infringement.

1. In the effort to prove that their customer, Marchiony, had committed an infringing act to which Petitioner could have contributed, Respondents seek (at p. 2 of their brief) to convey the idea that at the time Petitioner was selling its product to Marchiony, Dry Ice Corporation was *not* doing so. They say that Marchiony

> "*at one time had* purchased solid carbon dioxide"

from Dry Ice Corporation. The fact of the matter is, as testified to by Marchiony (Rec. p. 31, fol. 48)—

> "*we split the business between the Carbice (Petitioner) and the Dry Ice (Respondent).*"

Thus, at the time Marchiony was alleged to have infringed the patent, he was buying half of his requirements from Petitioner, and half from Respondent, *and using them both in containers ordered and obtained under the direction and with the approval and "license" of Respondents.* Obviously, even if the patent was valid, and for a patentable invention, there could be no *contributory* infringement under such circumstances, and Judge CAMPBELL in the District Court so held. He stated (Rec. p. 434):

> "The containers thus purchased by Marchiony were for a short period of time used in connection with the solid carbonic dioxide of the plaintiff *and* defendant, *he dividing his business between them* and therefore by the purchase of the containers, under such conditions, *Marchiony had a license from plaintiff to use them.*"

Counsel for Respondents realized this, and hence the effort to create the erroneous impression that at the time Marchiony was using the unpatented product of Petitioner he was not a customer of Respondents.

2. To bolster up their case, Respondents, in their brief at page 25, indulge in the practice, usual in cases where a patent is obviously invalid and valueless, of arguing elements of what, for want of a better name, may be characterized as "unfair competition." Petitioner is taken to task for its choice of a name, as well as of its trade name. This cause is not concerned with "unfair competition" or trade-mark infringement. Respondents, if they thought they had a case in either of these branches of the law, could have joined those issues in the present case and gone to trial on the *merits* thereof. Or, if Respondents were desirous of confining the present case to the extremely simple issue which it presents, they could have

filed independent suits on those points. They have done neither, but rather here attempt to enlist the unwarranted sympathy of the Court, in a case involving an absurdly simple issue, in an effort to sustain a patent so obviously devoid of invention and patentable subject-matter.

3. Nor can serious consideration be given to Respondents' solicitude for the labors of the Court (advanced at p. 25 of their brief), as to the reason why the Marchiony instance was selected for the purpose of establishing infringement. They say

> "so as to save the Court from having to consider *the many variations of Slate's package* in which Petitioner's product has been knowingly assembled"

the Marchiony instance was selected. This, of course, is mere persiflage. With the Slate patent admittedly directed to locating the specific refrigerant in the middle of the material to be refrigerated, what possible variations therefrom could be made? Respondents are referring, contrary to the argument advanced elsewhere in their brief, to the fact of which they are fully aware, that few, if any, users of solid carbon dioxide locate the refrigerant in the center of the package, but, to the contrary, as hereinbefore pointed out (*ante*, pp. 4-5), the usual and customary way is to put the refrigerant on top of the material to be refrigerated. This merely emphasizes the insincerity of Respondents' contention that the solid carbon dioxide industry has been built upon or owes anything to the alleged invention of the patent in suit.

4. With reference to the case of *Leeds & Catlin* v. *Victor* (213 U. S. 325), referred to on pages 30, *et seq.*, of their brief, Respondents are compelled to ignore the fact that this Court expressly did not overrule its previous

decision in the *Morgan Envelope Case* (152 U. S. 425), but distinguished therefrom by pointing out that in the *Morgan* case (as in the case at bar) *the article of commerce which was under the charge of contributory infringement, was perishable in use and required a renewal thereof whenever the device was put to use.* As Judge CAMPBELL in the District Court pointed out (Rec. p. 434):

> "The case at bar is clearly distinguishable from Leeds & Catlin Co. *v.* Victor Company, 213 U. S. 325, 330, 333, 335, *in which case the phonographic disc record was not consumed in the operation, and in that sense was not perishable.*"

There is no dispute, and can be no dispute, that solid carbon dioxide is perishable by nature and must be renewed whenever the "transportation package" is put in use. Were anything more than the foregoing statement necessary to establish the point we quote from Respondents' brief (p. 34):

> "When the Respondents sell solid carbon dioxide, they do not sell the casing of the package and do not sell the food product which becomes a part of the package. When the transportation package reaches its destination, the solid carbon dioxide has disappeared (it having gone off in the form of a gas), the food product is removed for consumption, and the case is usually thrown away, as it is usually merely a cardboard carton adapted for use only once."

We submit as obvious, therefore, that Judge CAMPBELL was entirely correct when he stated in his opinion (Rec. p. 434):

> "Even if it be held that the patent in suit is for a combination, one element of which is solid car-

bon dioxide, the defendant did not infringe the patent in suit by furnishing the solid carbon dioxide, as that was a perishable product, consumed in the operation, and the patentee has not patented and could not patent solid carbon dioxide. Morgan Envelope Co. *v.* Albany Paper Co., 152 U. S. 425, 38 L. Ed. 500."

5. Finally, we again note the fact that there is not one bit of evidence in the case to indicate, much less to prove, that Petitioner had *any knowledge whatsoever* as to how Marchiony was going to use its solid carbon dioxide. The only representation that was made, or that was necessary to be made, by Petitioner, was that its solid carbon dioxide—"will be found as satisfactory as Dry Ice in any and every way," and this representation was made in response to a request for assurance that Petitioner's product would give Marchiony "as satisfactory results in shipping ice cream under our present conditions of use as the product of the Dry Ice Corporation." Obviously, solidified carbon dioxide is the same and can be used for the same purpose and give just as good satisfaction whether it is made by Respondents or Petitioner, or someone else. The foregoing is the only evidence in the case bearing on the element of *knowledge* by the one charged to have *contributed* to an infringement. Knowledge *is necessary to be proven* in order to establish the charge of contributory infringement. Therefore, as purely a legal matter, there is nothing to substantiate Respondents' assertion (made at p. 42 of their brief) that Petitioner "knew just how Marchiony intended to use" the solid carbon dioxide he purchased, other than counsel's mere assumption of the fact.

It was for this reason that Judge CAMPBELL in the District Court found (Rec. p. 433):

"Assuming, but not finding, that the patent in suit was for a combination comprising the refrigerant apparatus, materials to be refrigerated and frozen carbon dioxide as a refrigerant, *there was no infringement shown.*"

6. Indeed, as we have pointed out on page 26, of our main brief, the claims of the Slate patent are directed to a mechanical structure—a container, and Judge CAMPBELL in the District Court so found. He stated (Rec. p. 433):

"Defendant contends that the patent is for a container.

"In my opinion, the defendant is correct and no infringement was shown, because at most, defendant could only be a contributory infringer *and to sustain such a charge it would have been necessary to show that defendant contributed materials going into the construction of the container, and such charge would not be sustained by showing that commodities were used in the container.*"

The soundness of Judge CAMPBELL's conclusion is made further evident by his further statement:

"The use of solid carbon dioxide as a refrigerant restricted the materials to be refrigerated to materials that would not be injured by freezing, such as ice cream, *and if plaintiff is correct in its contention that the furnishing of the refrigerant by the defendant to Marchiony constituted infringement, then it could as well claim that the furnishing of the materials to be refrigerated was an infringement.*"

As to the Question of Validity of the Slate Patent.

There are several points in Respondents' argument on this subject which require brief comment.

Anticipation.

Respondents attribute "invention" to the *structure* of the claimed combination of the Slate patent because of the refrigerative effect of the gas evolved from the solid carbon dioxide. They assert that this cold gas fills all parts of the package, and thus effects efficient refrigeration. The difficulty with this contention, however, is that this is *inherent* to solid carbon dioxide, and exactly the same thing occurs with water ice. Indeed, as is pointed out in the Mosler and Ladewig patent No. 236,906 of 1881 (Defendant's Exhibit H-7, Rec. p. 399), which discloses a transportation package for butter wherein the refrigerant is completely surrounded by the material to be refrigerated (except at the top of the ice chamber),

> "Butter is placed in the drawer C and ice in the chamber D. The lid or door of the box A is closed and the butter may then be sent to market or stored away for use.
>
> *"The cold air refrigerated by the ice in chamber D reaches every part of the same* and passes through the channels b of the drawers to the butter which is thereby kept cold and hard and in good condition."

But Respondents assert that the gas of carbon dioxide flows downwardly (being heavier than air), whereas air which is chilled by water ice moves in convection currents. If this be true, it is a physical property inherent to carbon dioxide, and not attributable, in any sense, to "invention" by Slate. However, as we view it, it is wholly immaterial how or why the carbon dioxide gas or the chilled air reaches every part of the container. The controlling fact is that they do so, and the result—refrigeration—is inevitably the same.

Insufficiency of Disclosure.

The attack on the validity of the patent for this reason is treated on pages 41 to 44, inclusive, of our main brief. The subject is referred to in Respondents' brief under paragraph numbered 8 on page 53 thereof, and presents another illustration of the liberties that have been taken, by Respondents, with the evidence in the case. Respondents' witness Jones testified as an expert and, as we pointed out in our main brief (p. 41), advanced twelve factors which he stated must be intelligently taken into account in order to be able to design a package to utilize the alleged invention of the Slate patent, and as to which factors the patent is entirely silent. Respondents state—

> "But Jones is not there stating the various things to be necessary to produce a 'practical' structure as petitioner asserts; but is stating the things to have in mind and provide for in order to utilize the invention to its highest efficiency (pp. 150, 151). As Jones said (p. 154, fol. 220): 'A knowledge of those factors would be sufficient to design an efficient package, but an efficient package can be constructed without a knowledge of any of them.'"

Both statements in the foregoing quoted passage of Respondents' brief are untrue as we will now show.

On page 152 of the record the cross examination of the witness is reproduced in question and answer form. It will be plainly seen that the witness *was specifically questioned* as to what factors (pursuant to testimony he had given to direct examination), would *have to be known and taken into account* in producing and designing a transportation package capable of utilizing the alleged invention of the patent in order to obtain any results at all. The witness himself stressed the fact (see answer

to the fourth question of cross examination, p. 152) that the factors *had* to be known and be combined to get a result. Attention is likewise directed to all of the questions and answers on page 154. Thus, the first statement in Respondents' brief, quoted above, is not true.

As to the second statement of the above quoted portion of their brief, it is quite apparent that Respondents have attempted to convey the impression that Jones testified that an efficient package utilizing the alleged invention of the Slate patent *could* be constructed *without knowledge of any of the factors* which he had previously testified were necessary to be known in order to get any result. Jones testified to no such thing, as is made apparent by the two succeeding questions leading up finally, to the question by the Court as to what the witness meant (p. 155)—

> "By the Court:
>
> "Q. *A man might stumble on it if he stumbled properly?* A. *That is the point.*"

In other words, *only by accident* could one utilize the Slate invention, without knowledge of the dozen odd factors Jones initially advanced as *necessary to be known* in order to obtain any results.

Motion Picture Patents Case.

Petitioner is taken to task (at p. 41 of Respondents' brief) because on page 24 of our main brief we reproduced *claim 1* of the Latham patent involved in the *Motion Pictures Patents Case*, whereas it was *claim 7* of that patent which was involved in the suit. The point that was made in our brief was that in the *Motion Pictures Patents Case* the unpatented film of the Latham patent

was just as necessary and indispensable a part of the claimed invention as is the specific refrigerant—solid carbon dioxide—in the present case. The inference sought to be drawn from Respondents' brief is that such is not the fact with respect to claim 7 of the Latham patent. Claim 7 of the patent is as follows:

> "The combination with devices adapted to support the bulk *of a flexible film* and supply *it* for exposure and receive *it* after exposure, of positively driven toothed rotary devices located between and entirely disconnected from said supporting devices and at opposite sides of the exposure window, said toothed devices being adapted to carry and feed *the flexible film* by the engagement of their teeth *with equally spaced holes made in the edges of the film* and to respectively produce and take up slack *in the film*, and an intermittently acting rotary feeding device also provided with teeth which engage with *the holes in the film*, whereby *the film* is intermittently fed across the exposure opening."

It is quite apparent that claim 7 of the Latham patent emphasizes the above point even more forcefully than does claim 1 reproduced at page 21 of our brief.

CONCLUSION.

For the reasons summarized on page 49 of our main brief, the decision of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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